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No. 75-1218

In the Supreme Court of the United States

OCTOBER TERM, 1975

ANTHONY R. RUSSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 527 F.2d 1051.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1975. A petition for rehearing with suggestion for rehearing *en banc* was denied on January 26, 1976. The petition for a writ of certiorari was filed on February 25, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence derived from court-authorized wire interceptions should have been suppressed because petitioner was not named in the intercept applications and orders.

2. Whether the trial court erred in not giving a requested instruction regarding prior inconsistent statements of witnesses.

STATEMENT

After a second jury trial[1] in the United States District Court for the District of Kansas, petitioner was convicted of conspiring with others[2] to violate 18 U.S.C. 1952 by traveling in interstate commerce and using interstate telephones to carry on acts of prostitution and bribery contrary to state law, in violation of 18 U.S.C. 371. He was sentenced to two years' imprisonment and fined $10,000. The court of appeals affirmed (Pet. App. A; 527 F.2d 1051).

The facts are set forth in detail in the opinion of the court of appeals (Pet. App. A2-A4). Briefly, they show that co-defendant Lowman, a resident of Missouri, operated massage parlors in Kansas City, Kansas, which were fronts for houses of prostitution. Petitioner, an attorney with police connections, agreed to provide Lowman with advance notice of any police plans to raid his illegal establishments. Petitioner received payments of as much as $1,000 a month for this service, a portion of which was allegedly passed on to co-defendant Dailey, captain of the Kansas City police vice unit. Jerry Lawson was a police officer who also agreed to provide protection to Lowman and who later went into business with him.

[1]The first trial ended in a mistrial because of a juror's misconduct.

[2]Co-defendants William Lowman and Jerry Lawson pleaded guilty to participating in the conspiraey and testified for the government at petitioner's trial. Lowman was sentenced to six months' imprisonment and Lawson was sentenced to imprisonment for a year and a day. Co-defendant Thomas Dailey was acquitted by the jury.

As corroborative evidence, the government introduced five telephone conversations between petitioner and his co-conspirators, which were monitored pursuant to court authorized electronic surveillance of three massage parlors and an apartment, all used by Lowman in his prostitution business.[3] Two massage parlors were monitored for 20 days pursuant to an order issued by Judge Earl E. O'Connor of the United States District Court for the District of Kansas on October 12, 1972; this authorization was extended for an additional 20 days on November 1, 1972. On the same date, Judge O'Connor also authorized simultaneous monitoring of the third massage parlor and the apartment.[4]

ARGUMENT

1. Petitioner contends that he was a person "known" to be committing the offense and whose communications would be intercepted, and thus that under 18 U.S.C. 2518(1)(b)(iv) and 4(a) the government was required to name him in the three intercept applications, and that its failure to do so required suppression of the evidence against him derived from the interceptions. The courts below rejected the premise of petitioner's claim; both the district court and the court of appeals found that there had been no probable cause for the government to believe that incriminating conversations of petitioner would be overheard during the interception (Pet. App. A9). There

[3]The conversations, which are reproduced as an appendix to the court of appeals' opinion (Pet. App. A16-A20), are innocuous on their face. In four of them, petitioner asks to talk to "Bill," who is out; in one of these, petitioner sympathizes with the complaints of the woman who answers the phone that business is bad because a new massage parlor has been opened. In the fifth conversation, "Bill" agrees to meet petitioner right away.

[4]This order was extended for an additional 20 days, but petitioner was not overheard during the extension period.

is no need for this Court to review this essentially factual determination. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275.[5] Thus, although petitioner correctly points out (Pet. 20-22) that there is a conflict in the circuits on the scope of the naming requirement in 18 U.S.C. 2518(1)(b)(iv) and 4(a), that conflict is not implicated in this case, and there is no indication that any court of appeals would have sustained petitioner's contention. There is, accordingly, no need to hold this case pending the disposition of *United States* v. *Donovan,* No. 75-212, certiorari granted, February 23, 1976, the outcome of which will not affect the proper disposition of this case.

2. During cross-examination of government witnesses, petitioner questioned them about prior statements made to the FBI and at previous court appearances, for the purpose of impeaching their testimony (Pet. 28-29). Petitioner asked the court to instruct the jury that these prior statements were "admissible only to impeach the credibility of the witness, and not to establish the truth of these statements" (Pet. 11). The court refused to give the requested instruction, although the substance of it was conveyed to the jury.

Petitioner points to no way in which the statements offered for impeachment were more incriminating than the direct testimony of the witnesses, and we are aware of none. There was accordingly no real chance that the jury would convict on the basis of the prior statements, rather than the direct evidence of the witnesses. Nor was

[5]Contrary to petitioner's claim (Pet. 22), the court below did not hold that hearsay cannot support a determination of probable cause, but only that on the particular facts of this case, the hearsay statements known to the government and contained in the affidavit supporting the intercept application were not sufficient (Pet. App. A9-A10).

there any need to warn the jury that the statements were unreliable as proof of guilt because petitioner was unable to test their truth by cross-examination, since the declarants testified at trial and were fully cross-examined, See *Nelson* v. *O'Neil,* 402 U.S. 622; *California* v. *Green,* 399 U.S. 149. In these circumstances, there was no necessity for the requested instruction.[6]

In any event, the instructions given conveyed to the jury the substance of the requested instruction. First, the judge told the jury that statements made by co-conspirators during and in furtherance of the conspiracy could be considered as to all co-conspirators (Tr. 2939). He then instructed the jurors in effect that the statements made to the FBI and at previous court appearances could not be used against petitioner (Tr. 2939-2940): "statements of any conspiracy [*sic*] which are not in furtherance of the conspiracy, or made before its existence or after its termination, may be considered as evidence only against the person making them." Finally, the jury was told the purpose for which the previous statements could be considered (Tr. 2943):

> A witness may be discredited or impeached * * * by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony * * *.

Thus the substance of the requested instruction was given: that the previous statements could not be considered as evidence against petitioner, but that they could be

[6]Since the witnesses had given direct testimony in court regarding petitioner's involvement in the criminal enterprise, and petitioner points to nothing in the prior statements he brought out on cross-examination of a significantly inculpatory nature, there is no conflict between the decision below and those in the cases cited at Pet. 29-30.

considered as impeaching evidence against the witnesses who made them. It is also significant that the statements in question were not introduced by the government as part of its proof, but by the defendant during cross-examination of the witnesses. Hence, the judge's instructions only explained what must have been obvious to the jury throughout the trial, namely, that the prior statements were introduced only for impeachment purposes. Under the circumstances, the court below correctly held that there was no error in the instructions given.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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